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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

RASHPAL BRAR,

Plaintiff and Appellant,

v.

CITY OF BANNING,

Defendant and Respondent.

E045416

(Super.Ct.No. RIC479605)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas E. Weathers,
Judge. Affirmed.

Rager & Noiroux, Kathleen Rager; and Robert J. Wheeler for Plaintiff and
Appellant.

Liebert Cassidy Whitmore, Melanie Poturica and Judith S. Islas for Defendant and
Respondent.

1. Introduction

The City of Banning discharged Rashpal Brar from the position of Assistant
Public Works Director, Electrical Utility, a job he held from October 1998 until he was

fired in November 2005. The reasons identified for his termination were that he had violated city policies involving harassment and computer use.

The superior court denied Brar's petition for writ of mandate (Code Civ. Proc., § 1094.5) to have his discharge set aside. Brar appeals. We affirm the superior court judgment.¹

2. Factual and Procedural Background

The claims made against Brar primarily involve sexually-provocative images observed on his computer monitor, either the screensaver or several kinds of pop-ups. Although the parties, the witnesses, and the attorneys freely use the term "pornography" to describe the images, there was no evidence of images of people engaged in sexual conduct. Instead, the witnesses described Brar's computer as displaying a screen saver featuring women in bathing suits like those in the notorious Sports Illustrated's swimsuit issue. Additionally, advertisements for penile enlargements and images of topless or partially-clothed women sometimes appeared as pop-ups² on Brar's computer monitor. In March 2005, the city, using "sniffer software," conducted a covert surveillance of Brar's computer that did not detect any visits to pornographic websites during a 19-day period.

¹ We deny the request for judicial notice filed September 5, 2008, for the same reasons as stated in our order of May 21, 2009.

² "Pop-up ads or pop-ups are a form of online advertising on the World Wide Web intended to attract web traffic or capture email addresses. It works when certain web sites open a new web browser window to display advertisements."
<<http://en.wikipedia.org/wiki/Pop-up>>

a. Investigation and Termination

In April 2005, Brar was placed on administrative leave during an investigation of charges he had violated the city's policies involving harassment, personal phone use, and use of electric systems.

On November 16, 2005, the city served Brar with a notice of proposed termination. After Brar responded, Paul Toor, the public utilities director, fired him on November 22, 2005. The stated reasons for Brar's termination were his violations of the city's policies regarding harassment, including sexual harassment, and the use of electric systems and tools.

More specifically, Toor found that Brar had intentionally accessed and displayed "sexually explicit and pornographic material" creating "a hostile workplace . . . an uncomfortable and sexually-charged environment for the other employees in the department." Toor identified Brar's conduct as a violation of the city's policy No. AP-14 against "visual Harassment of an employee, e.g. derogatory posters, cartoons, or drawings." Toor also faulted Brar for commenting on an employee's weight loss and ogling her.

Additionally, Toor found that Brar had intentionally accessed pornographic websites and non-work-related websites, violating the city's policy No. C-10, prohibiting computer use for "Harassment" and "Obscene or suggestive messages or offensive graphical images" and limiting Internet use to "City-related business activities and information gathering."

b. Administrative Hearing

At Brar's request, an advisory arbitration hearing was held for three days in August and September 2006.

Marilyn Sharp testified that Brar was her supervisor for six years. Between 2004 and 2005, he displayed embarrassing images of "[p]enises and girls in G-strings" on his computer. To avoid being subjected to these images, she would stand in the doorway to his office. Sharp never complained for fear Brar would retaliate against her. When Sharp lost weight, Brar commented to her that men would find her attractive. She was uncomfortable when he tried to set up a date for her with another employee. Brar's nickname, used by other employees, was "[r]eal pervert" or "RP." Brar criticized Sharp's spelling and work and for spending too much time with Colleen Garcia.

Colleen Garcia submitted a declaration stating that Brar was her supervisor and his computer displayed images of a penis and women in bikinis and G-strings. Garcia avoided looking at his computer and Brar would click off the screen when Garcia came in his office. She did not complain because she was afraid of retaliation. She agreed Brar was called "RP" for "Real Pervert." She was uncomfortable around Brar.

Another employee, Patrick Irwin, a line crew supervisor, testified that he saw inappropriate material—nude or partially-clothed people or topless women—twice on Brar's computer screen in 2003 or 2004. Irwin was aware of Brar's nickname "really perverted."

Frederick Mason, an administrator, testified that, when Brar was his supervisor, Mason observed sexual images on Brar's computer screen in 2002 and afterwards.

Mason recalled one image as being of a topless woman wearing sheer underwear revealing pubic hair. Another image was of a penis for a penile enlargement advertisement. When Brar complained he was having problems with lewd pop-ups, Mason suggested he ask a computer administrator to correct the problem. Mason believed pop-ups are caused by visiting a website with that type of material. He had never had any problem with pop-ups. Mason also saw Brar using provocative photographs of swimsuit models as a screensaver. He warned Brar the images could be perceived as sexual harassment. Mason thought Brar behaved with condescension toward women.

In 2002, Eric Brown, an information systems coordinator, removed the pop-ups from Brar's computer and installed a filter to prevent them. No other employee had reported a problem with pop-ups. In March 2005, Brown installed "sniffer" software on Brar's computer to track the websites he visited and generate an Internet history log. The log showed Brar visiting non-work-related sites, like the Indian Tribune, but no pornographic sites.

Brown explained that in order to receive pop-ups via email, the user would need to click on a hyperlink in the email that would redirect the user to another website. If one were to receive a pornographic email and click on it, it would immediately display a pornographic image.

Duane Burk, the director of public works, testified he did not receive pornography from unsolicited emails but he did have problems with pop-up advertisements for Viagra,

although never an image of a penis. Burk remembered once seeing a swimsuit screensaver on Brar's computer.

George Thacker recalled sitting in Brar's office in December 2004 and observing photographs of women in small bikinis, revealing their "cleavage, legs, stomachs, and arms." He thought the images were inappropriate for the workplace.

The city hired Judy McCollin, a private investigator, to investigate Brar. She interviewed Brar and witnesses, taking notes by hand, and then drafting them as narrative statements. Summarizing her interview with Eric Brown, McCollin said Brown explained it would usually require several steps to access pornographic pop-ups but that viruses could cause unsolicited email. An inexperienced user could inadvertently access improper material. Brown told McCollin that "Brar was very concerned because the links he accessed were 'hard core pornography.'" He said Brar told him 'get this smut off my computer.'" McCollin concluded Brar had violated Banning's policy against harassment and had been involved in accessing adult websites. She also concluded he had violated city policy by excessive personal use of the Internet.

Toor, the public utilities director, testified that Brar reported to him. Toor had never observed objectionable material or a swimsuit-model screensaver on Brar's computer. He described Brar's personal computer usage as excessive and inappropriate. Before Brar's termination, Toor had given him good and excellent evaluations.

Judy Holmes testified that Brar was her supervisor and she never looked at his computer screen. She overheard her coworkers, including Marilyn Sharp, complain about the computer images.

Brar testified that Colleen Garcia was a difficult employee who often complained about coworkers. Marilyn Sharp also complained and her work was poor quality. Frederick Mason complained about Garcia, who smoked, and Garcia and Sharp who wasted time gossiping. Brar once found a Post-It on his desk, stating “RP [—] Real Prick.” Other employees were given similarly rude nicknames.

In 2002, when Brar opened an email, it caused a pop-up of a nude woman that could not be closed and was followed by a flood of nude images. Brar asked Mason to help him and he called Brown to ask him to fix the computer. Brar denied ever accessing a pornographic website. Brar had three pictures of women in bathing suits as screensavers. But he did not view the pictures as objectionable. He used the Internet for personal reasons at lunch and on his breaks.

c. The Arbitrator’s Advisory Decision

The arbitrator issued a recommendation in favor of Brar. He concluded that there was not sufficient credible evidence that the objectionable images, excluding the screensaver, were intentionally displayed by Brar. The arbitrator found credible the explanation that a pop-up can be transmitted via email when it is mistakenly accessed by the user. The arbitrator dismissed as unsupported other allegations that Brar made inappropriate comments to Marilyn Sharp or that Brar had accessed pornographic websites.

Regarding the swimsuit-model screensaver, the arbitrator decided that the images were not pornographic but were not appropriate for the workplace. In this respect, he found Brar at fault but he concluded the city should have counseled him before imposing

stronger discipline. He also found that Brar had used the Internet for non-work-related reasons for less than 10 minutes a day.

For the foregoing reasons, the arbitrator found the city did not have just cause to terminate Brar's employment.

d. The City Manager's Decision

The city manager rejected the arbitrator's decision. The city manager found the evidence that Brar had used a screensaver displaying bikini-clad women supported the claim of sexual harassment, defined as "verbal or physical conduct of a sexual nature when such conduct: [¶]. . . [¶] [h]as the purpose or effect of interfering with work performance or creating an otherwise hostile working environment." Additionally, the city manager rejected Brar's explanation that the pop-up images of penises and nude or partly-clothed women occurred accidentally. The city manager agreed with Toor that Brar's behavior toward Sharp and other women constituted sexual harassment. The evidence of the screensaver, pop-up images, and Brar's non-work-related Internet use demonstrated a violation of the city's computer use policies. Finally, the city manager concluded that the stronger measure of termination was required rather than counseling.

e. The Superior Court Judgment

The superior court conducted an independent review, affording a strong presumption of correctness to the city manager's findings. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) The superior court conducted a deferential review of the penalty involved. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45-46.) The superior court held that the city manager properly relied on McCollin's report and

that the weight of the evidence supported the findings that Brar intentionally accessed and displayed sexual images on his computer and caused discomfort to his coworkers. Brar also violated the Internet use policy. The superior court determined his termination was justified and was not an abuse of discretion. (*Kazensky v. City of Merced* (1998) 65 Cal.App.4th 44, 76-77.)

3. The Standard of Review

The standard of review is discussed thoroughly in *Kazensky v. City of Merced*, *supra*, 65 Cal.App.4th at pages 51-54 and more succinctly by this court in *Schmitt v. City of Rialto* (1985) 164 Cal.App.3d 494, 500-501 [4th Dist., Div.2]:

“The disciplinary proceedings initiated against plaintiff affected a ‘fundamental vested right’ in his city employment. The superior court was therefore required to exercise its independent judgment in its review of the administrative finding that plaintiff was guilty of misconduct. (*Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802, 820-825; *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, 44-45.) [¶] However, ‘[the] penalty imposed by an administrative body will not be disturbed in mandamus proceedings unless an abuse of discretion is demonstrated. (*Skelly v. State Personnel Bd.*[(1975) 15 Cal.3d 194, 217]; *Magit v. Board of Medical Examiners* (1961) 57 Cal.2d 74, 87.) Neither an appellate court nor a trial court is free to substitute its discretion for that of the administrative agency concerning the degree of punishment imposed. (*Nightingale v. State Personnel Board* (1972) 7 Cal.3d 507, 515.)’ (*Barber v. State Personnel Bd.* (1976) 18 Cal.3d 395, 404.)

‘Decisions prior to *Strumsky* made it clear that the penalty imposed can be disturbed only

for a manifest abuse of discretion, and *Strumsky* did not alter this limitation on the trial court's power.' (5 Witkin, Cal. Procedure (1983 supp.) Extraordinary Writs, § 222E, p. 365.)”

Additionally, “. . . on appeal from a judgment in a case where the trial court is required to exercise its independent judgment, our review of the record is limited to a determination whether substantial evidence supports the trial court's conclusions and, in making that determination, we must resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court.” (*Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652, 659-660, citing *County of Alameda v. Board of Retirement* (1988) 46 Cal.3d 902, 910, *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10, and *Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.)

4. Propriety of Termination

With respect to the superior court's ruling affirming the city manager's decision, we agree substantial evidence supports the trial court's conclusions. Brar objects that the city relied improperly on McCollin's summaries of her investigative interviews. This argument has little force because the testimony of the witnesses, with the exception of Eric Brown, supplied substantial evidence without the need for recourse to McCollin's summaries. The only pertinent information from McCollin's summary of Eric Brown's statement was favorable to Brar because it supported his explanation for having inadvertently caused the pop-ups.

Brar also contends there was no evidence that Brar caused disruption of the workplace and created a hostile work environment. We disagree. Six employees, men and women, testified that Brar's provocative computer images made them uncomfortable and were inappropriate in the workplace. In addition, Sharp was discomfited by Brar's manner toward her. Her testimony was corroborated by Frederick Mason's testimony about Brar's general attitude toward women. As such, the city offered substantial evidence that Brar violated the city's policy No. AP-14 against sexual harassment by engaging in "conduct of a sexual nature when such conduct: [¶] . . . [¶] Has the purpose or effect of interfering with work performance or creating an otherwise hostile working environment."

We are not convinced by Brar's assertion that he immediately removed any offending images. Although Brown did remove pop-ups from Brar's computer in 2002 or 2003, there was substantial evidence that the pop-ups continued to appear after that date and the evidence is not disputed by Brar that he installed the offensive screensaver after 2002 and never removed it.

Nor do we agree that termination, instead of a lesser penalty, was unwarranted in this instance, constituting an abuse of discretion. In addition to the poor judgment Brar showed with regard to computer use, the evidence supported that he did not adhere to city policy on Internet use even though there seems to be a tacit understanding that some non-work-related Internet use was practiced and condoned by city employees.

Taken altogether, Brar's violation of city policies concerning harassment and computer were all relevant circumstances in deciding the level of discipline, especially

when his conduct could expose the city to liability for sexual harassment claims, causing “actual or potential harm to the public service.” (*Schmitt v. City of Rialto, supra*, 164 Cal.App.3d at p. 503 citing *Skelly v. State Personnel Bd., supra*, 15 Cal.3d at p. 218; *Kolender v. San Diego County Civil Service Commission* (2007) 149 Cal.App.4th 464, 471.)

Furthermore, the city’s harassment policy allows for “stronger measures” if required and both Toor and the city manager decided that termination in the first instance was warranted. Even if reasonable minds may differ about the propriety of the level of discipline, an appellate court may not substitute its discretion for the administrative agency’s discretion. (*Schmitt, supra*, at p. 504; *Kazensky v. City of Merced, supra*, 65 Cal.App.4th at pp. 76-77; *Flippin v. Los Angeles City Bd. of Civil Service Commissioners* (2007) 148 Cal.App.4th 272, 279, 283.)

5. Disposition

We affirm the judgment. The city as the prevailing party on appeal shall recover its costs.

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s/Gaut
J.

We concur:

s/Hollenhorst
P. J.

s/McKinster
J.